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No. 04-768

In the Supreme Court of the United States

MICHAEL ALBERT CERVINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was precluded from challenging the voluntariness of his guilty plea for the first time on collateral review because he had failed to demonstrate that he was "actually innocent" of possessing child pornography.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 379 F.3d 987. The opinion of the district court (Pet. App. E1-E8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2004. A petition for rehearing was denied on September 22, 2004 (Pet. App. C1). The petition for a writ of certiorari was filed on November 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional plea of guilty in the United States District Court for the Western District of Oklahoma, petitioner was convicted of one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. D1-D9.

Petitioner subsequently filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion. Pet. App. E1-E8. After granting a certificate of appealability, the court of appeals affirmed. *Id.* at A1-A16.

1. In April 1999, petitioner posted two images of child pornography to an Internet newsgroup. Pet. App. D3. The material depicted a minor female engaged in sexually explicit conduct. Presentence Report (PSR) 4-5. During a subsequent search of petitioner's home, agents discovered hundreds of pornographic images on his computer's hard drive, many of which depicted children under the age of 12. PSR 4.

2. In December 1999, a federal grand jury charged petitioner with shipping child pornography in interstate commerce, in violation of 18 U.S.C. 2252A(a)(1), and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. A2. Pursuant to a plea agreement, petitioner entered a conditional plea of guilty to the possession charge, reserving the right to appeal the district court's denial of his motion to suppress evidence seized during the search of his residence. Gov't C.A. Br. 2; Pet. App. A2-A3, D3. The Section 2252A(a)(1) charge was dismissed. Pet. App. A3.

At his plea colloquy, petitioner engaged in an exchange with his attorney to establish a factual basis for his plea:

> Q: [O]n or about September 7, 1999, * * * did you knowingly possess images of child pornography that were contained on your computer?
>
> A: Yes, I did.
>
> Q: Did the images show persons under the age of 18 engaged in sexually explicit conduct?
>
> A: Yes.

9/26/00 Tr. 14-15; Pet. App. A9.[1] In his plea agreement, petitioner also admitted that his computer "contain[ed] visual depictions involving the use of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252A." Amended Plea Agreement 4 (Aug. 28, 2000); Pet. App. A9.

In its recitation of petitioner's offense conduct, the PSR stated:

> The image [petitioner posted on the internet] contained an image depicting a minor engaged in sexually explicit conduct. Investigative reports indicate that the image is of an unknown minor female with her legs spread. The image is centered on her genitals. Agents advised that this image is of an individual under the age of 18.

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[1] Petitioner further admitted that the relevant images were "shipped and transported in interstate commerce including by computer." 9/26/00 Tr. 15.

PSR 4; see also *ibid.* (hard drive of petitioner's computer "contained hundreds of pornographic images, numerous of which depicted children under the age of 12"). Petitioner did not object to the PSR, see 9/26/00 Tr. 17, and he did not otherwise dispute that the images he possessed were of real children engaged in sexually explicit conduct. The district court sentenced petitioner to 27 months of imprisonment, to be followed by three years of supervised release. See Tr. 23.

3. As provided in the plea agreement, petitioner appealed the district court's order denying his motion to suppress the evidence seized at his residence, as well as his request for a related evidentiary hearing. The court of appeals affirmed the district court's rulings on both issues. Pet. App. D1-D9.

4. Approximately nine months after the court of appeals affirmed petitioner's convictions, this Court issued its decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The Court in *Free Speech Coalition* held that the definition of child pornography contained in former 18 U.S.C. 2256(8)(B), which encompassed any "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," was overbroad and violative of the First Amendment. See 535 U.S. at 244-256. The Court concluded, *inter alia*, that the justifications for proscribing pornographic images that are the product of child sexual abuse are not fully applicable to "virtual" child pornography—*i.e.*, visual depictions created without the participation of real children. See *id.* at 249-251.

5. The following month, petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. 2255. Petitioner contended, *inter alia*, that the statute under which he had been convicted was unconstitutional under

Free Speech Coalition. See Pet. App. E4. He further contended that his guilty plea was unknowing and involuntary because it was made at a time when neither the statutory text nor the pertinent case law distinguished between actual and virtual child pornography. See *id.* at A4.

The district court held that petitioner was not entitled to relief. See Pet. App. E1-E8. The court explained that, because petitioner had not raised his constitutional challenge either before his plea of guilty or on direct appeal, the claim could be raised on collateral review only if petitioner could "demonstrate[] cause for the default and actual prejudice or that he is 'actually innocent.'" *Id.* at E6 (quoting *Bousley* v. *United States*, 523 U.S. 614, 622 (1998)). The district court held that petitioner could not establish "cause" for his procedural default because a number of litigants had raised essentially the same First Amendment challenge even before petitioner had entered his guilty plea. See *id.* at E7-E8. In support of his claim of innocence, petitioner argued that it is "impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense * * * were actual identifiable minor children," rather than "computer generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors." *Id.* at E8. The district court rejected that argument, based largely on petitioner's admission at the plea hearing that the images he possessed "show[ed] persons under the age of 18 engaged in sexually explicit activity." *Ibid.* (quoting 9/26/00 Tr. 15).

6. The court of appeals granted a certificate of appealability on two questions: (1) whether petitioner

had made a sufficient showing of actual innocence to overcome the procedural bar against consideration on collateral review of previously defaulted claims; and (2) whether the rule announced in *Free Speech Coalition* applies retroactively to cases on collateral review. Pet. App. A4. The court ultimately affirmed the district court's denial of post-conviction relief, holding that petitioner had failed to make the requisite showing of "actual innocence" to excuse his procedural default. *Id.* at A1-A13.

a. Petitioner contended that, in light of *Free Speech Coalition*, he satisfied the "actual innocence" standard because it was impossible to determine beyond a reasonable doubt whether the pornography he possessed depicted real children. Pet. App. A7. The court of appeals "assume[d] in theory that if a movant really could produce evidence that would convince a reasonable juror that the image in question is indeterminate (such that it [is] not possible to conclude that the image is actual beyond a reasonable doubt), a movant would be actually innocent." *Ibid.* The court held, however, that petitioner had failed to make the requisite factual showing. *Id.* at A7-A13.

In describing petitioner's burden, the court of appeals explained that a Section 2255 movant seeking to demonstrate "actual innocence" must produce "new reliable evidence" that, when viewed together with the original evidence of guilt, is "powerful enough to convince a court that no reasonable juror would have voted to convict." Pet. App. A6, A8 (citing *Schlup* v. *Delo*, 513 U.S. 298 (1995)). Petitioner proffered congressional testimony from the president of the National Center for Missing and Exploited Children, who had stated that virtual pornographic images can be indistinguishable

from actual images, as well as an advertisement from a software company that demonstrated the technique of "morphing." *Id.* at A7-A8. Petitioner also indicated that he would like to call an expert to testify in support of his theory. *Id.* at A8. The court of appeals held that the new evidence, while having "some probative value as to [petitioner's] innocence" (*ibid.*), was outweighed by the original evidence of petitioner's guilt—particularly petitioner's admissions, in his plea colloquy and plea agreement, that the pornographic images he possessed were of actual children. See *id.* at A9 (quoting plea colloquy); *ibid.* ("[Petitioner's] admission in the plea agreement is quite specific that actual minors were used; not indistinguishable images."). Examining petitioner's new evidence together with the prior evidence of guilt, the court concluded that "it simply is not probable that no reasonable juror would find him guilty beyond a reasonable doubt—no matter what an expert might now say." *Ibid.*

b. Judge Holloway dissented. Pet. App. A13-A16. She would have found the statements in petitioner's plea colloquy and plea agreement to be ambiguous on whether the pornographic images were of actual children. *Id.* at A14-A15.

ARGUMENT

Petitioner contends (Pet. 23-30) that he is "actually innocent" of possessing child pornography in light of *Free Speech Coalition*, and that he is therefore entitled to challenge the voluntariness of his guilty plea on collateral review despite his procedural default. That claim lacks merit and does not warrant this Court's review.

1. Because petitioner did not contend on direct appeal that his guilty plea was unknowing and involuntary, and did not argue that application of the child pornography statute to his conduct was unconstitutional, his current claims are procedurally defaulted. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) ("even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review"). A defendant may raise a defaulted claim on collateral review only if he can first show either "cause" for failing to raise it earlier and actual "prejudice," or that he is "actually innocent" of the crime of which he stands convicted. *Id.* at 622. Because petitioner does not claim to have satisfied the "cause and prejudice" requirement, the relevant inquiry is whether he has demonstrated his "actual innocence" of the child pornography offense. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* at 623 (internal quotation marks omitted).

In *Free Speech Coalition*, this Court struck down as overbroad under the First Amendment two provisions of the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, 110 Stat. 3009-26. One provision defined the term "child pornography" to include a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B); see 535 U.S. at 244-256. The other defined the term to include a visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D); see 535

U.S. at 257-258. The Court did not question the constitutionality of 18 U.S.C. 2256(8)(A), which covers any visual depiction whose production "involves the use of a minor engaging in sexually explicit conduct."

In addressing petitioner's request for collateral review, the court of appeals assumed, *arguendo*, that a movant for post-conviction relief could satisfy the "actual innocence" standard in this context by "produc[ing] evidence that would convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt)." Pet. App. A7. The court concluded, however, that petitioner had failed to make the requisite factual showing. See *id.* at A7-A9. Petitioner's factbound disagreement with the court of appeals' application of the established legal standard does not warrant this Court's review. Cf. *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals.").

2. The court of appeals was correct in holding that petitioner had failed to satisfy the "actual innocence" standard. That standard requires a showing of "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. In his plea colloquy and plea agreement, petitioner acknowledged that the images he possessed "show[ed] persons under the age of 18 engaged in sexually explicit conduct," and that his computer "contain[ed] visual depictions involving the use of minors engaging in sexually explicit conduct." See page 3, *supra*; see also Pet. App. A11 ("The ordinary and reasonable meaning of the admission in the plea agreement is that the images involved the 'use' of real mi-

nors."). In his subsequent attempt to call those admissions into question, petitioner has presented no evidence focusing on the particular images he possessed, or casting doubt on the likelihood that those images depicted actual children engaging in sexually explicit activity. See *id.* at A10. Rather, his claim is that, as a general matter, "it is difficult to tell the difference" between actual and virtual child pornography. *Id.* at A9.

In *Free Speech Coalition*, this Court rejected as "somewhat implausible" the contention that virtual pornographic images are generally indistinguishable from images that depict actual children engaged in sexually explicit activity. 535 U.S. at 254. The Court explained that, "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice." *Ibid.* Absent any particularized basis for doubting that the images petitioner possessed "were exactly what they purported to be" (Pet. App. A10), the generalization on which petitioner relies is insufficient to establish his "actual innocence" of the child pornography offense. Cf. *Schlup* v. *Delo*, 513 U.S. 298, 321 (1995) (explaining that the "actual innocence" standard was adopted in order to ensure that the "fundamental miscarriage of justice exception" to procedural default rules "would remain rare and would only be applied in the extraordinary case") (internal quotation marks omitted).

3. Contrary to petitioner's contention (Pet. 24-29), the Tenth Circuit's decision in this case does not conflict with any decision of another court of appeals. The cases on which petitioner principally relies (see Pet. 25-26, 28)

did not involve prosecutions for child pornography offenses. In three of those cases, the movants for post-conviction relief invoked this Court's decisions in *Bailey* v. *United States*, 516 U.S. 137 (1995), and *Muscarello* v. *United States*, 524 U.S. 125 (1998), in challenging their firearms convictions under 18 U.S.C. 924(c). See *United States* v. *Montano*, 381 F.3d 1265, 1268-1274 (11th Cir. 2004); *United States* v. *Sanders*, 157 F.3d 302, 304-306 (5th Cir. 1998); *United States* v. *Benboe*, 157 F.3d 1181, 1183-1185 (9th Cir. 1998). In *Waucaush* v. *United States*, 380 F.3d 251, 254-258 (6th Cir. 2004), the court granted relief from the movant's conviction under 18 U.S.C. 1962, holding that the movant was "actually innocent" of engaging in activities "affect[ing] interstate commerce" because his enterprise was intrastate, non-economic, and without substantial effects on interstate commerce.

Those rulings, involving the fact-specific application of the "actual innocence" standard to entirely different statutes, do not support petitioner's challenge to his conviction for possessing child pornography under 18 U.S.C. 2252A(a)(5)(B).[2] To the contrary, those cases

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[2] Petitioner also refers in passing (Pet. 26) to the decision of the Sixth Circuit in *United States* v. *Boyd*, 312 F.3d 213 (2002). The court in *Boyd* reversed a sentencing enhancement based on Guidelines § 2G2.2(b)(2), notwithstanding the defendant's admission that he had attempted to send "pornographic child pornography" to a specified individual. See 312 F.3d at 219. The court of appeals characterized that admission as "no more than a conclusory description of the nature of the material in question, rather than evidence." *Ibid.* Here, by contrast, petitioner's admissions were specifically intended to establish a factual basis for his plea of guilty to the child pornography offense. The decision in *Boyd*, moreover, arose on direct appeal, and the defendant's challenge to the sentencing enhancement had been properly preserved in the district court. See *id.* at 215. The Sixth Circuit in

demonstrate that the court of appeals' articulation of the governing legal standard accords with settled law. See Pet. App. A5; *Montano*, 381 F.3d at 1274; *Waucaush*, 380 F.3d at 254; *Sanders*, 157 F.3d at 305; *Benboe*, 157 F.3d at 1184.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Boyd therefore had no occasion to apply the demanding "actual innocence" standard that governs petitioner's request for collateral review of a procedurally defaulted claim.